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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 01.03.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal Nos.82 & 83 of 2007
and C.M.P.No.1 of 2007

Shanmugam ... Appellant in S.A.Nos.82&83/2007
(Defendant/Plaintiff)

Vs.

Gurusamy ... Respondent in S.A.No.82/2007 (Plaintiff)

Gurusamy
P.K.Sundaram ... Respondents in S.A.No.83/2007 (Defendants)

PRAYER IN S.A.No.82 of 2007: Second Appeal under section 100 of C.P.C. against the Judgment and decree dated 25.03.2003 made in A.S.No.34 of 2002 on the file of the Subordinate Court, Pollachi setting aside the decree and judgement dated 01.02.2002 made in O.S.No.879 of 1997 on the file of the District Munsif Court, Pollachi, Coimbatore District.

PRAYER IN S.A.No.83 of 2007: Second Appeal under section 100 of C.P.C.against the Judgment and decree dated 12.03.2003 made in A.S.No.2 of 2003 on the file of the Subordinate Court, Pollachi which was dismissed for default confirming the decree and judgement dated 01.02.2002 made in O.S.No.871 of 1997 on the file of the District Munsif Court, Pollachi, Coimbatore District.

For Petitioner : Mr.I.C.Vasudevan
For Respondents : Mr.T.P.Manoharan

J U D G M E N T

The plaintiff is the appellant in S.A.No.83 of 2007 having lost in both the courts below in respect of his claim for permanent injunction restraining the defendants from trespassing or entering any portion of the suit property and putting up any construction. That was the suit filed by the appellant in O.S.No.871 of 1997, which was dismissed and the appeal in A.S.No.2 of 2003, which was also dismissed by the first appellate court.

2. The first defendant in O.S.No.871 of 1997 Gurusamy has filed a suit in O.S.No.879 of 1997 for an injunction against the appellant

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in both the appeals from interfering with his construction work and possession of the suit property. The trial court has dismissed the said suit by way of a common judgement in O.S.No.871 of 1997 and 879 of 1997. On appeal by the said plaintiff Gurusamy the first appellate court in A.S.No.34 of 2002 has granted a decree of injunction and it was as against the said judgement, the defendant has filed the second appeal in S.A.No.82 of 2007.

3. The main contention raised on behalf of the appellant is that while the first appellate court before which both the appeals in A.S.No.2 of 2003 and A.S.No.34 of 2002 were pending and parties in both the appeals are one and the same, especially in the circumstance that the said appeals arose from a common judgement of the trial court and the parties were represented by their respective counsel, the first appellate court ought not have dismissed the appeal in A.S.No.2 of 2003 for default against which S.A.No.83 of 2007 has been filed by the plaintiff in O.S.No.871 of 1997.

4. It is also his contention that when the first appellate court, as in detail discussed the entire points involved in A.S.No.34 of 2002, in fairness, it should have given opportunity to the plaintiff in O.S.No.871 of 1997 to make his submission in A.S.No.2 of 2003. On the other hand, it is seen that while A.S.No.2 of 2003 was dismissed for default on 12.03.2003, A.S.No.34 of 2002 was decided by a judgement dated 25.03.2005. Admittedly, the appellant in A.S.No.2 of 2003, whose appeal was dismissed for default, has not filed any application for restoration of appeal but on the other hand, has filed the second appeal. In any event, the appellate court has extensively dealt with in detail in A.S.No.34 of 2002 and the issues involved are the common.

5. Therefore, I do not think it is necessary to remand the matter back once again to the first appellate court for a decision in A.S.No.2 of 2003. A reference to the pleading shows that originally, a larger extent of nearly 57½ cents comprised in S.F.No.336/1 belonged to Kaliappa Gounder and Karuppasamy Gounder and as per the oral division among them, they have been enjoying the properties in division for many years and the Northern side was allotted to Kaliappa Gounder and the Southern side to Karuppasamy Gounder and it was subdivided as S.F.No.336/1D. The plaintiff in O.S.No.879 of 1997, who is the respondent in the appeals have purchased the said property, which is the subject matter of suit on 30.10.1995. It is seen that the other co-owner Kaliappa Gounder has borrowed an amount from one Palanisamy Gounder and he died without discharging the debt. A suit was filed in O.S.No.12 of 2003 for recovery of amount by Palanisamy Gounder against the legal heirs of Kaliappa Gounder. There was a decree and in execution of the decree in E.P.No.130 of 1989 on the file of the Sub Court, Udumalpet, the suit property in O.S.No.871 of 1997 was brought to sale and the plaintiff in O.S.No.871 of 1997, who

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is the appellant, is the court auction purchaser in the auction held on 20.06.1990 and the said sale was confirmed on 22.08.1996. The plaintiff in O.S.No.871 of 1997 has filed E.A.No.742 of 1990 for possession and since there have been some obstructions, the matter is pending enquiry before the Sub Court Udumalpet. Therefore, the plaintiff in O.S.No.871 of 1997 is a court auction purchaser in respect of the suit property, which belongs to the portion of Kaliappa Gounder and has not been given possession.

6. According to the plaintiff in O.S.No.871 of 1997, he is in constructive possession being a court auction purchaser, whose purchase has been confirmed, however, the delivery of possession has not been effected so far. It is in these circumstances, the plaintiff in O.S.No.871 of 1997 has filed the suit for injunction against the defendants, who is the adjacent owner claming title as per the sale deed dated 30.10.1995 and subsequent possession of the same by obtaining patta in his name. The trial court in the common judgement has dismissed the suit in O.S.No.871 of 1997 on the basis that the appellant's claim of title from Kaliappa Gounder under a sale certificate dated 15.10.2001 under Ex.A.4 and the description of the property is not correctly mentioned since the same has to be identified and in view of the same and also on the basis that the possession has not been handed over to the plaintiff in the said suit and stating that the plaintiff in O.S.No.871 of 1997 has himself stated in the plaint that the defendants have in fact obtained Patta in respect of the lands belonging to them. But on the other hand, the plaintiff has filed the suit for injunction against the respondents from trespassing into the suit property and put up the construction and it was on that basis the suit in O.S.No.871 of 1994 was dismissed, since the identification of the property is in dispute.

7. In respect of the suit in O.S.No.879 of 1997 filed by the respondent, the trial court has dismissed the suit on the ground that in respect of the properties stated to have been purchased by plaintiff in the said suit, who is the respondent, the said property in Survey No.336/1D2 not only belongs to the vendor of the plaintiff in the suit but also one P.K.Sundaram, the second defendant in O.S.No.871 of 1997, therefore, on the basis of non-jointer of the necessary parties, the said suit filed by the respondents came to be dismissed.

8. The appellate court in A.S.No.34 of 2002 by reversing the judgement of the trial court and relying upon Ex.B.17 sale deed executed in favour of the defendant along with evidence of the said Gurusamy, plaintiff in O.S.No.879 of 1997 as D.W.2 and on analyzing the document Ex.B.13 adangal has come to a definite conclusion that the suit property in O.S.No.879 of 1997 absolutely belong to the plaintiff in O.S.No.879 of 1997, who was examined as D.W.2 in the common judgment.

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9. While in respect of this suit, the trial court has dismissed the suit only on the basis of non-jointer of necessary party, namely, that the other co-owner P.K.Sundaram, who is arrayed as second defendant in O.S.No.871 of 1997, has not been made as a party in O.S.No.879 of 1997.

10. On the hand a reference to the written statement filed by the defendant in O.S.No.879 of 1997, who is the appellant in these appeals show that it is not even the case of the appellant that the suit filed by the respondent in O.S.No.879 of 1997 should be dismissed on the basis of non-jointer of necessary parties and there was not even any issues framed by the trial court regarding non-jointer.

11. In view of the above said facts and especially in the circumstance that the first appellate court in A.S.No.34 of 2002 has clearly come to a conclusion on the evidence especially based on Ex.B.17 and evidence of D.W.2 apart from Ex.B.13 that the suit property in O.S.No.879 of 1997 exclusively belongs to the plaintiff in the suit, I am of the considered view that there is absolutely no illegality in the judgement of the first appellate court in A.S.No.34 of 2002.

12. It is also relevant to point out that the plaintiff in O.S.No.871 of 1997, who is the court auction purchaser admittedly, has not been put in possession, has not even come forward with a definite case as to how the defendant in the said suit, who is the respondents in the appeal has trespassed in the property and there is absolutely no evidence regarding the trespass at all. In any event, it is correctly found by the learned trial Judge as far as the claim of the plaintiff's property in O.S.No.871 of 1997, that the same has not been identified. As the plaintiff has not been put in possession by due process of law and in the absence of specific pleading and proof regarding the allegation of trespass by the defendant in O.S.No.871 of 1997, I do not think that there is any substantial question of law involved in both these appeals. In view of the same, the appeals fail and are dismissed.

No Costs. Consequently, the connected C.M.Ps. are closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1.The Subordinate Judge,
Pollachi.

2.The District Munsif,
Pollachi.

+1cc to Mr.I.C.Vasudevan, Advocate Sr 12784
+1cc to Mr.T.P.Manoharan, Advocate Sr 12348

PV (CO)
km/2.4.

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